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No. 03-1619

In the Supreme Court of the United States

GDF REALTY INVESTMENTS, LTD.; PARKE PROPERTIES I, L.P.; AND PARKE PROPERTIES II, L.P.,

Petitioners,

v.

GALE A. NORTON, Secretary of the Interior, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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The government defends the application of the ESA take provision to the cave insects with two conflicting rationales—both of which defy *Lopez* and *Morrison*. Though differing in approach, both suffer from the same basic flaw—they employ misdirected "substantial effects" inquiries that shift the focus from the expressly regulated activity to other attenuated connections with commerce. These inconsistent rationales highlight the disarray in the lower courts, and their lack of fidelity to *Lopez* and *Morrison* underscores the reason why this Court's intervention is urgently needed.

First, the government half-heartedly attempts to defend the Fifth Circuit's extraordinarily broad holding that although cave insect takes alone do not substantially affect interstate commerce, they can be regulated based on the aggregate effect on commerce of *all takes of all endangered species*. This rationale uses a factually unsupported and legally flawed "interdependent web" analysis to shift the focus from the non-economic activity regulated here (cave insect takes) to the economic effects of taking other species. This Court has *never* allowed aggregation of non-economic conduct, however, and there is no compelling reason to do so here.

The second rationale offered by the government is flatly at odds with the first and directly contradicts the Fifth Circuit's holding below. Whereas the first rationale focuses on the effect of takes (but mistakenly includes all species and aggregates non-economic conduct), the second rationale mistakenly shifts the focus from cave insect takes to the petitioners' commercial motivations—conduct which is not regulated by the express terms of the take provision.

In addition to relying on conflicting rationales, the government concedes key facts that undermine its position. It does not dispute that the cave insects have never been traded in commerce or that they have no known commercial value; that all cave insect takes are intrastate; or that the courts below found no evidence that cave insect takes have *any* effect on interstate commerce, much less a substantial effect.

The government concedes significant legal issues as well. It makes no attempt to defend the take provision under either the "channels" or "instrumentalities" categories of Commerce Clause authority. Moreover, the government's defense under the "substantial effects" category concedes that the take provision lacks a jurisdictional element and that Congress made no findings regarding any "substantial effect" of takes on interstate commerce. Finally, the government wholly ignores this Court's admonition that a Commerce Clause rationale must have a logical stopping point. Because neither rationale advanced by the government contains such a limit, the Court should grant the writ to resolve the conflict evident in the lower courts and to restore appropriate *commercial* limits to the commerce power.

1. This Court should review the Fifth Circuit's decision because it deepens inter-circuit disagreements over the scope of Commerce Clause authority to regulate takes of wholly intrastate, non-economic species. Although no court has struck down an application of the ESA "take" provision to such species (and some have foreclosed future as-applied challenges[1]), the Fifth Circuit below expressly rejected the *sole* rationale that the D.C. Circuit used to uphold a similar application of the ESA in *Rancho Viejo*.[2] In fact, *every* post-*Lopez* case in this area has been closely divided, with strong dissents by respected jurists such as Jones, Sentelle, Luttig, and Roberts.

The majority below held that the activity regulated by ESA § 9(a)(1)(B)—"takes" of cave insects—is not economic or connected to commerce and that petitioners' motive for that activity is irrelevant because it is not the focus of the

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[1] See Pet. App. 34-36, 88-89; *NAHB*, 130 F.3d at 1052-54 (D.C. Cir. 1997) (Wald, J.); *id.* at 1058-59 (Henderson, J., concurring).

[2] Compare Pet. App. 20-27 with *Rancho Viejo*, 323 F.3d at 1067; see also *id.* at 1159 (Sentelle, J., dissenting from denial of reh'g *en banc*); *id.* at 1160 (Roberts, J., dissenting from denial of reh'g *en banc*).

statute.[3] Pet. App. 21, 28-30. The government does not defend that holding. Instead, it endorses the D.C. Circuit's contrary focus on commercial motive. U.S. Br. 11-12. The government tries to obscure this disagreement by burying it in footnotes,[4] misstating the Fifth Circuit's reasoning,[5] and throwing in a red herring about facial versus as-applied challenges,[6] but these stratagems will not make the disagreement go away.

The Fourth, Fifth, and D.C. Circuits also cannot agree on how and to what extent takes of a non-economic endangered species can be aggregated with other takes in an attempt to locate a substantial effect on commerce. Pet. 28-29. As Judge Edith Jones pointed out in her dissent for six members of the *en banc* Fifth Circuit, the panel's expansive use of aggregation "rests on the false implication that all takes of all

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[3] The government persistently misidentifies this case as a general challenge to ESA § 9 (U.S. Br. 2, 9, 11, 12-15) so that it can rely on connections with commerce not relevant here ("the conduct regulated by Section 9 of the ESA is principally of an economic nature," U.S. Br. 9). This case only challenges § 9(a)(1)(B) as applied to intrastate, non-economic species of cave insects. Unlike § 9(a)(1)(B), other provisions of § 9 have jurisdictional elements tying the regulated activity to commerce. Pet. 19 n.7.

[4] Compare U.S. Br. 10 n.3, 12 n.5 with Pet. App. 20-25, 28-29 (rejecting government arguments that scientific interest in cave species or commercial motivation of petitioners' actions supply a substantial connection to commerce).

[5] Compare U.S. Br. 15 (Fifth Circuit "declined to resolve the constitutional question solely on the ground that the regulated entity's own conduct was commercial in character") with Pet. App. 21, 28-30 (squarely rejecting government's argument that takes of cave species alone substantially affect interstate commerce).

[6] Petitioners assert an as-applied challenge to ESA § 9(a)(1)(B), not a facial or overbreadth challenge. Compare Pet. 1 and Pet. App. 1, 20, 90 with U.S. Br. 12-14 & n.6. The government's argument that petitioners are trying to have it both ways is baseless. The reason petitioners ask this Court to disregard any commercial motivation for cave species takes is that, as the Fifth Circuit held, such motives are irrelevant.

species necessarily relate to an ecosystem, which by its very grandiosity must at some point be 'economic' in actuality or effect." Pet. App. 89. In addition, as Judge Sentelle has observed, the ESA establishes "no general regulatory scheme of interstate commerce in a commodity such that the cumulative effect of purely local state and private activities could substantially affect it." *NAHB*, 130 F.3d at 1066-67 (Sentelle, J., dissenting). And aggregation cannot in any event be used to sustain regulation of entirely non-economic activity, as Judge Luttig has explained. *Gibbs*, 214 F.3d at 507-08 (Luttig, J., dissenting).

This disarray as to two key questions (the ESA-regulated activity to which Commerce Clause analysis applies and the scope and operation of the aggregation principle), combined with the vigorous dissents from distinguished jurists that characterize the decisions in this area, powerfully signal that these circuits erred in their analyses and that this Court's review is now necessary. The lack of a split in *outcomes* is not significant. The question presented affects the balance of power between the States and the federal government, which this Court traditionally has taken pains to preserve. And further percolation would be of no benefit. The range of competing viewpoints has been thoroughly explored in the opinions, dissents, and concurrences in the courts below, not to mention legal commentary and the briefing that has been (and would be) provided to the Court by the parties and numerous *amici*. And the stark facts of this case provide an excellent vehicle for considering the limits of congressional power to regulate takes of wholly intrastate, non-economic species under the Commerce Clause.

This Court should also review the Fifth Circuit's decision because it is at odds with *Lopez* and *Morrison*. The government barely responds to our extensive explanation (Pet. 13-22) that the requirements of *Lopez* and *Morrison* are not satisfied here, and it refuses to acknowledge that this Court has *never* approved aggregation of non-economic

conduct. Instead of treating the non-economic nature of cave species takes, the lack of a jurisdictional element in the statute (Pet. 18-19), and the lack of findings regarding a substantial effect on commerce (Pet. 19-20) as reasons to interpret the ESA narrowly, the government dismisses those factors as unimportant, relying on *NAHB* and the decision below to support an extraordinarily expansive view of aggregation. U.S. Br. 9-11 & n.4. The government also fails to explain how its aggregation argument has a logical stopping point, as *Lopez* and *Morrison* require. This Court should grant the writ to ensure that the requirements of *Lopez* and *Morrison* are not "consigned to aberration" (*Gibbs*, 214 F.3d at 508 (Luttig, J., dissenting))—as the government seems to believe they should be—but are applied as the "proper framework for conducting the required analysis" of whether Congress has exceeded the bounds of its Commerce Clause authority. *Morrison*, 529 U.S. at 609.

2. Absent aggregation, which is improper for reasons discussed in section 3 below, applying the ESA take provision to wholly intrastate, non-economic species such as the cave insects violates the Commerce Clause. The government offers two arguments against this conclusion, neither of which is persuasive. First, it pretends that cave insect takes "can be expected to have a meaningful impact" on commerce because, in the past, a few scientists traveled to Texas to study the insects or take specimens for museums. U.S. Br. 4, 10 n.3. As the Fifth Circuit explained, however, this connection to commerce is "negligible," "theoretical," and "far too attenuated to pass muster" when the substantial effect requirement of *Lopez* and *Morrison* is taken seriously. Pet. App. 28-29. The government's position is a clear example of what this Court cautioned against in *Maryland* v. *Wirtz*: the use of "a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." 392 U.S. 183, 196 n.27 (1968); see also Pet. 21.

Second, the government attempts to shift the focus away from activities expressly regulated by the plain text of the ESA—here, cave insect takes—to "the sort of large-scale commercial development activities in which petitioners wish to engage," arguing that Congress clearly possesses authority to regulate such activities. U.S. Br. 11-12. But this argument—which the D.C. Circuit accepted in *Rancho Viejo*—is beside the point. The ESA does not purport to regulate either commercial development activity or activity undertaken with a commercial motive.[7] See Pet. App. 85 n.4 (Jones, J., dissenting from denial of reh'g *en banc*) ("Arguably, Congress could pass a statute prohibiting anyone engaged in interstate commerce from 'taking' endangered species. But Congress did not do so in these parts of the statute."). As the Fifth Circuit correctly explained, the proper inquiry is whether takes themselves (the activity objectively regulated by the statute) have a substantial effect on commerce, not whether the subjective *motive* for takes is commercial or whether *regulation* of takes would affect commercial actors. See Pet. App. 21-27; Pet. 3, 10, 23-28.

The Fifth Circuit also noted that the facial challenges in *Lopez* and *Morrison* would have failed under the government's (and *Rancho Viejo*'s) approach, because the statutes could constitutionally have been applied to gun possession or violence against women undertaken for a commercial purpose. Pet. App. 24. The government responds that in those cases there was no reason to suppose violations would typically be committed by commercial actors or for economic reasons. U.S. Br. 14. But in *Lopez* itself, as the government recognized at the time, the violation indisputably was committed for economic reasons—the defendant had

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[7] See also Pet. App. 90, quoting 16 U.S.C. § 1538(a)(1)(B) ("it is unlawful for any person subject to the jurisdiction of the United States to * * * take any [listed] species"); *cf.* U.S. Br. (I) (incorrectly implying that this provision regulates "commercial development activities that would result in the taking of endangered" species).

been paid $40 to deliver the gun to another student.[8] As the government admits, the defendant's facial challenge could not have succeeded in *Lopez* if commercial motive were the proper focus. See U.S. Br. 12 ("'a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others'"). *Lopez* dictates that the government's focus on petitioners' commercial motive is wrong.

Moreover, from a practical perspective, the Solicitor General's focus on subjective commercial motive is suspect and unworkable. Though the government argues (at 9) that ESA § 9 has not been applied to conduct undertaken for non-economic purposes, that contention is belied by the facts of this very case.[9] In 1993, early in the government's multi-year effort to restrict GDF's use of its property (an effort carried out in a manner deplored by the district court, see Pet. 8-9), Dr. Fred Purcell was threatened with criminal prosecution merely for clearing trash and brush off his property. Pet. App. 4; (RX E:323). FWS never claimed that Dr. Purcell's "crime" of cleaning up his property was tied to a commercial motive, nor would the record support such a claim. The scope of the government's commerce power—and of the complex ESA regulatory scheme—should not depend on subjective and uncertain assertions regarding motive, particularly where the strict-liability take provision lacks a motive inquiry.

3. Because the government fails to show that cave insect takes have a substantial effect on commerce, they cannot constitutionally be regulated absent aggregation. The court of appeals held that cave insect takes, though non-economic themselves, "may be aggregated with all other ESA takes," reasoning that regulating non-economic takes is "essential"

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[8] See *United States* v. *Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993); *United States* v. *Lopez*, No. 93-1260, Br. for United States 7 (U.S. June 2, 1994).

[9] See also, *e.g.*, *Loggerhead Turtle* v. *County Council*, 92 F. Supp. 2d 1296, 1298-99, 1304-06 (M.D. Fla. 2000) (holding sea turtles "taken" by non-commercial beach driving and beachfront lighting).

to Congress's regulatory scheme to protect "the 'interdependent web' of all species." Pet. App. 35-36. That ruling is erroneous and would leave federal power without limits.

This Court has *never* condoned the aggregation of wholly non-economic activities, as it repeatedly stressed in *Morrison*. See 529 U.S. at 611 n.4 ("in every case where we have sustained federal regulation under *Wickard*'s aggregation principle, the regulated activity was of an apparent commercial character"); *id.* at 613 ("our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature"); *id.* at 611 (only "some sort of economic endeavor" has been aggregated). The only intrastate activities that can be aggregated under the Commerce Clause are those that "arise out of or are connected with a commercial transaction," a test the cave species do not remotely satisfy. *Lopez*, 514 U.S. at 561.

Under the Fifth Circuit's approach, federal power has no discernible limits. Government can regulate every aspect of individuals' lives, from the time they get up in the morning, to what they eat for breakfast, to what hobbies they pursue, because all these affect an "interdependent" web of economic productivity. See *Morrison*, 529 U.S. at 611 ("'any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far'").[10] The unprecedented and limitless form of aggregation used by the Fifth Circuit requires urgent correction by this Court. And this case presents an exceptionally good vehicle to decide whether non-economic intrastate activities may be aggregated; no better example could be found of intrastate and non-economic objects of regulation than the completely isolated, local subterranean insect species at issue here.

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[10] See also *id.* at 616 n.6 ("the but-for causal chain must have its limits in the Commerce Clause area"); *Lopez*, 514 U.S. at 567 (rejecting a "'view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce'").

Rather than defend the Fifth Circuit's aggregation theory, the government argues that "the conduct regulated by Section 9 of the ESA is principally of an economic nature." U.S. Br. 9. But a statute cannot be upheld as a valid regulation of particular economic conduct if that economic conduct is not what the statute purports to regulate. See *Lopez*, 514 U.S. at 561 (stressing that the law in question was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms"); *Morrison*, 529 U.S. at 610 ("the noneconomic, criminal nature of the conduct at issue was central to our decision" in *Lopez*). Petitioners' commercial motivations are not part of the ESA's statutory scheme, as the court of appeals correctly held. See p. 6, *supra*.

4. The government's remaining arguments on the merits also reflect an extraordinarily expansive view of federal power quite inconsistent with this Court's modern teaching. Far from providing any reason to let the court of appeals' decision stand, these arguments counsel in favor of review.

The government asserts, without supporting citation, that "federal authority to act in th[e sphere of endangered species] is particularly appropriate because systemic obstacles exist to the adoption and enforcement of effective state wildlife-protection measures," and also that every endangered species is "appropriately regarded as a valuable national resource subject to protection by Congress." U.S. Br. 7-8, 11. Characterizing a problem as needing a national solution or deeming an asset of national importance does not, however, make non-commercial activity subject to federal regulation under the Commerce Clause. The commerce power is not a general police power. See *Lopez*, 514 U.S. at 566 ("The Constitution * * * withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation"). It is, furthermore, entirely speculative and frankly disrespectful to sovereign States for the government to assume that States will engage in a "race to the bottom" to

exploit their own environmental assets. U.S. Br. 8. Contrary to this speculation, state governments have acted as leaders in environmental regulation and would doubtless be more active still had the federal government not asserted authority in this area.[11] Under such circumstances, if Congress does have an ability to intrude on States' police powers through legislative fiat, that should be decided in this Court rather than anywhere else.

The government's contention (at 9-10) that "the [commercial] significance of a particular species cannot always be determined at a given point in time" proves too much. If pure speculation about what developments in commerce might occur in the distant future were enough to support federal regulation, the commerce power would be limitless. This Court has never approved conjecture as a principle of Commerce Clause analysis. Indeed, the only case from this Court cited by the government in support of this theory is one that did not involve a Commerce Clause challenge or ESA § 9 at all. U.S. Br. 10 (citing *TVA* v. *Hill*, 437 U.S. 153, 178-79 (1978)). If rank speculation about the future commercial value of an intrastate and non-economic activity is a valid form of Commerce Clause analysis, that principle also should be affirmatively announced by this Court, not applied *sub silentio* as a basis to deny review.

CONCLUSION

For the foregoing reasons and those set forth in the petition and the briefs of *amici curiae*, this Court should grant the petition.

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[11] See Brief of the States of Texas et al. as *Amici Curiae* 14 (collecting statutes and regulations); Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 ENVT'L L. 1, 47-48 (1999); National Governors Association, *Policy NR-12, Endangered Species Act Policy*, http://www.nga.org/nga/legislativeUpdate/policyPositionDetailPrint/1,1390,661,00.html (visited September 13, 2004).

Respectfully submitted.

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